No. 08-1296

In the Supreme Court of the United States

LESLEY SIMMONS ST. GERMAIN;
HILLARY ROSE HILLYER;
MELISSA BRANIGHAN LUMINAIS,
Petitioners,

v.

D DOUGLAS HOWARD, JR;
D DOUGLAS HOWARD, JR & ASSOCIATES;
HOWARD & REED, ATTORNEYS AT LAW,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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DISCLOSURE

There is no change in Petitioners' disclosure made in the Petition.

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PETITIONERS' REPLY BRIEF

Petitioners seek review of the Fifth Circuit's decision (1) affirming dismissal of a civil RICO case at the pleading stage "[b]ecause Appellants have not alleged the requisite predicate *criminal acts*", and (2) affirming denial of a first amendment as of right without any consideration of undue delay, dilatory motive, undue prejudice, repeated failure, or futility.

I. Respondents endorse the Fifth Circuit's misapprehension that some other crime in addition to mail and wire fraud must be shown.

The Fifth Circuit correctly observed that "[i]n their complaint, Appellants alleged that the predicate acts committed by Appellees were mail and wire fraud", but then the Fifth Circuit stated that the allegations "are at worst violations of the rules of professional responsibility", and that "Appellants have not alleged the requisite *criminal acts*". (Emphasis in published opinion below at Pet.2a-3a.) Mail and wire fraud evaporated over the course of three sentences.

Respondents (Opp.16) reveal the fundamental error of their support of the Fifth Circuit's "criminal act" pleading standard for civil RICO, stating "[t]hat is, an ethics violation by an attorney is a predicate offense only when the violation is also criminal". This is wrong. In this case the predicate acts are mail and wire fraud. There is no requirement for showing yet another level of criminality— fraud is enough.

In order to sufficiently allege mail and wire fraud, a plaintiff needs to particularly identify what was wrong about the fraudulent statements. State substantive law governing attorney conduct comes into play here.

It is wrong for an attorney to abruptly and prejudicially withdraw from representation of client after client, using threats of such abrupt and prejudicial withdrawal as a means of extorting clients. It is wrong for a law firm with no relationship to a client to take money from client after client. It is wrong for a law firm to operate under more than one law-firm name. It is wrong for an attorney to share fees with any attorney or firm in the absence of disclosure and approval by the client. It is wrong for an attorney to overbill and overcharge client after client. All of this was alleged with specificity and supported with evidence attached to the Complaint.

Without reference to the rules governing attorneys, a plaintiff might have to trace everything back to first principles. Louisiana has Rules of Professional Conduct. Those Rules are a close copy of the American Bar Association Model Rules, and are substantially the same rules as may be found throughout the United States. They define attorney wrongdoing. When the government is enforcing those rules, the proceeding is considered to be quasi-criminal.[1]

In *Bridge v. Phoenix Bond & Indemnity Co.*[2], the predicate acts were mail fraud where the perpetrators also violated a county's administrative, *non-criminal* "Single, Simultaneous Bidder Rule". Neither the civil RICO statutes nor the controlling jurisprudence require the additional level of criminality required by the Fifth Circuit here and endorsed by the Respondents.

Respondents (Opp.9) misunderstand Petitioners' point (Pet.12) that "[t]he availability of any evidence to attach to a civil RICO complaint is a matter of serendipity", where Petitioners are pointing out that

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1. *Crowe v. Smith*, 96-30851 (CA5 8/12/1998) 151 F.3d 217, 229

2. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U. S. __ (2008)

the investigative and coercive powers of the government are not available to non-governmental civil litigants, and are clearly addressing issues of *fact* and *proof*.

II. Respondents rehearse the elements of a civil RICO cause of action based on fraud, but fail to justify the Rule 12(b)(6) dismissal here.

Respondents, starting at Opp.6, list the elements of a civil RICO claim and then list a number of citations proving that some civil RICO cases get dismissed. Then Respondents list the elements of fraud and explain how fraud must be pleaded with particularity, followed by citations to cases where fraud was inadequately alleged. Respondents do not address the question whether the triggering of Rule 9(b) for allegations of fraud does or does not oblige a plaintiff to plead even the non-fraud elements of a claim with Rule-9 specificity. Respondents' treatment here is not useful.

Petitioners have pointed out (Pet.3-4) where all of the specific information required by Rule 9(b) is to be found in the Complaint. Petitioners did specifically allege time, place, contents, identity, and objective. They did specifically allege who, what, when, and how. Respondents explain the Rule 9(b) requirement, but do not explain how Petitioners have supposedly failed to meet the requirement.

III. Conflict between Eighth and Fifth Circuits on attorney misconduct exists regardless of any difference in fact patterns.

Petitioners cited *Handeen v. Lemaire* for the proposition that, in the Eighth Circuit, an attorney participating in the direction of a RICO enterprise violates the RICO statutes and the Eighth Circuit "will

not shrink from finding an attorney liable"[3], in contrast with the policy implied by the very short Fifth Circuit opinion here— that allegations which are plausible as ethics violations are categorically not cognizable as civil RICO predicate acts, notwithstanding proven use of the mails and wires. The categorical disparity of treatment of attorney wrongdoing is therefore a conflict between the Eighth and Fifth Circuits. Respondents' attempts (Opp.14-16) to distinguish the *Handeen* case are ill-considered, and their contention (Opp.14) that Petitioners infer that the Fifth Circuit "played favoritism" is offensive.

IV. Respondents misapprehend the issue of first amendment before responsive pleading as a matter of course, where the Fifth Circuit's policy conflicts with controlling jurisprudence and the other circuits.

Beginning at Opp.16, Respondents misstate the record several times regarding amendment of the complaint. Petitioners did state their intent and ability to amend in writing (R.509) and orally (R.656, Tr.41:16-20). The district court did not issue any written reasons, only oral reasons. The district court's oral reasons for denying amendment (R.672-73, Tr.57:14-58:18) did not consider undue delay, dilatory motive, undue prejudice, repeated failure, or futility, but formulaically recited the filing of a RICO case statement and an opposition to dismissal.

The Fifth Circuit affirmed the denial of a first amendment as of right with the following one-sentence analysis: "Appellants had several opportunities to state their best case". (Opinion below at Pet.4a.)

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3. *Handeen v. Lemaire*, 112 F.3d 1339, 1349 (CA8 1997)

Respondents misstate the record (Opp.18) where they state that the district court gave oral and written reasons for denying amendment. The district court only made an oral statement of reasons. Respondents continue to misstate the record (Opp.18) claiming "[t]he district court weighed the above factors"— referring to undue delay, dilatory motive, undue prejudice, repeated failure, and futility— when in fact the record shows that neither the district court nor the circuit court ever even mentioned those factors.

Respondents cite several cases (Opp.17-20) showing the Fifth Circuit's consistent policy to restrict amendment of pleadings, especially in civil RICO cases, but Respondents' cases support this Petition by further showing that this case is not an isolated error and is a legitimate test of the policy of the Fifth Circuit which is in conflict with controlling jurisprudence and (apparently) every other circuit.

Respondents (Opp.19-20) cite several cases teaching that a RICO case statement is considered in deciding a motion to dismiss. Those cases are inapposite here, where the issue is denial of amendment. Respondents do show that some jurisdictions require the RICO case statement months later than the twenty-something days after filing here, often after motions and amendments. Petitioners have already pointed out (Pet.5,8) that they knew nothing more when they filed their RICO Case Statement than they did twenty-nine days earlier when they filed the Complaint.

Respondents' two featured cases in attempted support of their contention that "several courts" consider the RICO case statement to be an amendment to the complaint which justify denial of amendment fail to

support that contention. Both the Third-Circuit case[4] (Opp.20) and the Eastern Pennsylvania case[5] (Opp.22) involved complaints which were allowed to be amended once or twice, where the RICO case statements were not required until many months after initial filing, and where second and third amendments were denied after full consideration of undue delay, dilatory motive, undue prejudice, repeated failure, and futility. Respondents' featured cases fail to support their contentions, as do their string-cited cases on pages 19-23. Instead, they support Petitioners' contention that no other circuit but the Fifth formulaically restricts the first amendment as of right of a civil RICO complaint, and they show that other jurisdictions provide for the filing of RICO case statements significantly later than the twenty-something days after initiation required here.

Respondents (Opp.21) mistakenly cite *Anderson v. Ayling*[6] in attempted support of their contention that the Third Circuit denies the making of a first amendment as a matter of course. The PACER docket for EDPA Case No. 02-cv-2352 shows that the complaint was amended eight months after filing and that the RICO case statement was timely filed at nine months after filing of the complaint. The Third Circuit reviewed and affirmed the district court's finding that *further* amendment would be futile, and said nothing about any RICO case statement.

On their Opp.20, Respondents try to distinguish Petitioners' cited Seventh Circuit case *Foster v. Deluca*, but that opinion clearly states that in the Seventh Circuit

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4. *Lorenz v. CSX Corp.*, 92-3667, 92-3694 (CA3 8/6/1993) 1 F.3d 1406.

5. *Allen Neurosurgical Assoc., Inc. v. Lehigh Valley Health Network*, 99-cv-04653 (EDPA 2001).

6. *Anderson v. Ayling*, 04-1180 (CA3 1/24/2005) 396 F.3d 265.

"[d]istrict courts routinely do not terminate a case at the same time that they grant a defendant's motion to dismiss; rather, they generally dismiss the plaintiff's complaint without prejudice and give the plaintiff at least one opportunity to amend her complaint",[7] which is exactly the opposite of the denial of amendment and the immediate termination affirmed by the Fifth Circuit in the instant case, and confirms a circuit-split.

Respondents' contention (Opp.16) that the "focal point" of their motion to dismiss should have provoked an amendment of the Complaint is false— their motion had no focal point. Respondents, as Defendants, filed a 53-page memorandum with their motion to dismiss and for sanctions (R.353-405) which was more than double the 25-page limit under the local rules, and it had 66 pages of "evidence", mostly state-court filings, attached (R.407-471). Among the scattershot presentation of grounds for dismissal, including *res judicata*, *vendetta*, the Fifth Circuit's (former) reliance requirement, contracts purportedly legalizing all wrongful actions, and demands for sanctions, it can be argued in retrospect that Respondents did touch upon the grounds actually used by the district court in dismissing the case. But Petitioners' opposition memorandum was required to respond to all of Respondents' arguments for dismissal, not just to the page that ended up containing the lucky guess. For the district court to have deemed the opposition memorandum the equivalent of an amendment is doubly in error because the opposition had to respond to a rambling, oversized motion, and because it would be incorrect procedure for a plaintiff to have attempted to file an amended pleading in the form of an opposition memorandum.

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7. *Foster v. Deluca*, 05-1491 (CA7 9/29/2008) 545 F.3d 582, 584.

V. Other misstatements by Respondents.

Respondents state the amount of money taken from each victim, the Petitioners here. (Opp.3.) Respondents' figures are too low— damages total $31,407.38. After acknowledging on page 3 these amounts of money taken from each Petitioner, Respondents then contend on pages 4, 5, 13, and 24 that Petitioners failed to allege any actual injury required for civil RICO standing.

Respondents misrepresent Petitioners' arguments in the Petition and before the courts below. Respondents downplay the Louisiana Rules of Professional Conduct, and never once refer to them by their correct name. Respondents downplay their actions as "possible ethics violations" and do not even acknowledge the ten-dollar-per-month-per-victim flat-out fraudulent overbilling that Petitioners both alleged and proved in the Complaint (R.14). Petitioners point out that "possible ethics violations" are *plausible* ethics violations.

On pages 8, 14, and 19, Respondents accuse Petitioners of misleading this Supreme Court, and on page 18 they accuse Petitioners of being disingenuous. Petitioners deny the accusations.

Respondents' characterizations on pages 4, 16, and 18 concerning Petitioners' attorney's oral statements to the courts below are inaccurate.

Respondents' allegation of "vendetta" and discussion of state-court litigation and disciplinary proceedings on pages 1-3 is irrelevant and inaccurate.

On page 13 Respondents state that the district court did not base dismissal of the civil RICO action on a lack of an allegation of reliance, which is wrong because the district court did (R.668-69, Tr.53:6-54:23) and the circuit court recognized it (Opinion below at Pet.3a-4a).

VI. Pending collateral litigation.

The attorney who is a Respondent here filed a collateral retaliatory attack on the dismissed civil RICO claims in a state-court action for defamation, naming Petitioners here, their attorney, and a Petitioner's father as defendants.[8] After the filing of this Petition, and after Petitioners here counterclaimed the state-law claims formerly pendant to the civil RICO claim, Respondent filed a bolstered amended complaint, which made the action removable and then transferable as a related case, with the result that Respondent's collateral attack and the counterclaims are now before the same division of federal district court that dismissed the civil RICO claims at issue here.[9]

VII. *Ashcroft v. Iqbal* opinion, the pleading standard, and amendment.

Ashcroft v. Iqbal,[10] recently decided, examines the interplay among Rules 8 and 9(b) and the plausibility standard— all at issue in the instant Petition. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a

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8. *D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer nee Smith, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, DDS*, 2009-2267, Civil District Court for the Parish of Orleans, Louisiana, filed 3 March 2009, removed.

9. *D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer nee Smith, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, DDS*, 09-3450, U.S. District Court for the Eastern District of Louisiana, removed 5 May 2009, pending.

10. *Ashcroft v. Iqbal*, 07-1015, 556 U.S. __ (5/18/2009).

court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[11] Here, factual allegations with supporting documentation were pleaded, and their veracity should have been assumed.

Twombly[12] "expounded the pleading standard for 'all civil actions'",[13] and the Fifth Circuit's not recognizing the *Twombly* plausibility standard in dismissal of this civil RICO action conflicts with controlling precedent and other circuits.

Petitioners point out that this Court in *Ashcroft v. Iqbal* ordered that the courts below should consider the issue of leave to amend the deficient complaint,[14] recognizing the right to amend which was denied to Petitioners here.

VIII. Conclusory statements are a necessary starting point, and should be read together with supporting detail in the complaint.

Respondents, in part I of their brief, approve of the courts below analyzing isolated statements in the Complaint and finding them conclusory and therefore dismissable. This Court recently observed that "legal conclusions can provide the framework of a complaint", even though "they must be supported by factual allegations".[15] Petitioners would push the analysis one step more and suggest that legal conclusions *must* provide the framework of a complaint

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11. *Ashcroft v. Iqbal*, slip op. at p.15.

12. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

13. *Ashcroft v. Iqbal*, slip op. at p.20.

14. *Ashcroft v. Iqbal*, slip op. at p.23.

15. *Ashcroft v. Iqbal*, slip op. at p.15.

in order to comply with Rule 8, which requires that a defendant be put on notice in short and plain language of what the complaint is about, and such language will necessarily be conclusory. If Rule 10 requiring separate paragraphs is considered, then the propriety of drafting complaints which start with short-and-plain conclusory statements supported in separate paragraphs by increasing levels of factual allegation is obvious. Here, Petitioners filed a Complaint which contained several conclusory statements, but every one of those statements was supported by allegations of specific facts, and with documentary evidence attached to the Complaint. The Complaint should be read as a whole document.

Petitioners' counsel is a patent attorney not lacking the ability to withhold a period until every idea is packed into one huge run-on sentence. But a civil complaint drafted like a patent claim would not give a defendant fair notice of what the complaint is about. Where the initial plain-but-conclusory allegations are immediately followed by several levels of additional detail and by thirty pages of documentation and proof, as was the case here, then the only fair way to construe such a complaint is as a whole— *in pari materia*— and not as isolated statements subject to isolated analysis as was done by the district court here.

Surely the tightening of pleading requirements and application of the plausibility standard does not require that every future complaint be written in monstrous run-on sentences and multi-page paragraphs that touch every element and every shred of evidence before daring to divulge what a lawsuit is about.

CONCLUSION

Because Petitioners as civil RICO Plaintiffs filed a Complaint alleging the specifics of a pattern of mail and wire fraud, including attached evidence, because no further allegation or proof of an additional "criminal act" is properly required, and because the opinion below states an erroneous standard for Rule 12 dismissal of civil actions, Petitioners' action should be reinstated.

Because Petitioners have a right under Rule 15(a) to make a first amendment before responsive pleading to their Complaint, and because factors justifying denial of amendment were not considered and are not present, Petitioners' civil RICO action should be reinstated and allowed to be amended.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

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